NO. 33871

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

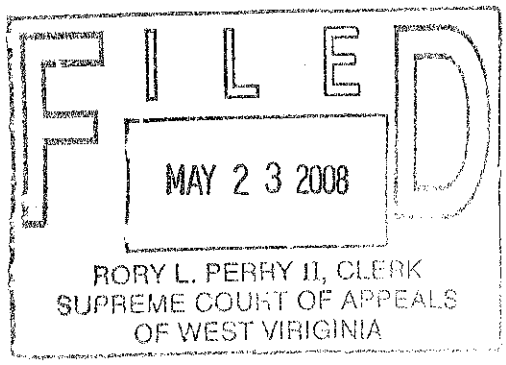
PROSECUTING ATTORNEY OF KANAWHA COUNTY, WEST VIRGINIA,

Appellee,

v.

BAYER CORPORATION,

Appellant.



REPLY BRIEF OF APPELLANT BAYER CORPORATION

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Dated: May 23, 2008

Table of Contents

Table of Authorities

Cases

Statutes

Rules

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I. INTRODUCTION AND SUMMARY

Bayer Corporation's ("Bayer") opening brief showed that, even if the Circuit Court had jurisdiction to overturn the ruling of the Kanawha County Commission (hereinafter, the "Commission") – and it did not – the Court applied an erroneous and improper de *novo* standard of review that caused it to substitute its assessment of the live testimony received by the Commission. Bayer Br. 14-31. Bayer showed that under the appropriate standard of review, the Circuit Court should have deferred to the Commission's determination that the errors that resulted in an erroneous and undisputed overpayment of taxes by Bayer were inadvertent and thus properly the subject of exoneration. *See id.* at 32-36, 3-5.

In his brief, the Prosecuting Attorney purports to act on behalf of the State of West Virginia but makes no effort to account for West Virginia's interest in providing an effective procedural mechanism for taxpayers to recover tax overpayments. Instead, the Prosecuting Attorney, like the intervening Assessor and Public Library Board (hereinafter, collectively, the "Assessor") dispute virtually every procedural and substantive issue and seek to interpose

additional non-statutory barriers to the recovery of tax overpayments. These arguments should be rejected.

As to procedure, the Prosecuting Attorney and the Assessor argue that the Circuit Court should be affirmed because it was entitled to review the Commission's fact-finding *de novo* and, on cross-appeal, that taxpayers such as Bayer cannot recover overpayments unless they have proven error by clear and convincing evidence before the Commission *and* the Circuit Court. Prosecuting Attorney Br. 19-22; Assessor Br. 34-36 (arguing that standard of proof is clear and convincing evidence before the Commission and the Circuit Court). There is no legitimate argument for requiring taxpayers to shoulder an unduly heavy burden and to do so both before the Commission and at the Circuit Court to recover what is undisputedly an overpayment of taxes. More to the point, the procedural arguments of the Prosecuting Attorney and the Assessor find no support in the language of the relevant statutes enacted by the West Virginia legislature, and they make no effort to address the longstanding law from this Court refuting those arguments. *See, e.g., Humphreys v. County Court of Monroe County*, 90 W. Va. 315, 110 S.E. 701, 702 (1922) (a commission's factual findings may be reversed by the circuit court if the findings were "clearly and fully rebutted" *i.e.*, were clearly erroneous); *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 542, 591 S.E.2d 93, 100 (2003) (reviewing court may not "substitute[] its judgment" on certiorari for that of initial fact-finders as "[i]t is axiomatic" such decisions are entitled to deference "unless clearly erroneous"); *cf.* Syllabus Point 8, *Killen v. Logan County Comm'n*, 170 W. Va. 602, 604, 295 S.E.2d 689, 691 (1982) (requiring taxpayer prove its case before commission "by a preponderance of the evidence").

On the merits, the Prosecuting Attorney and Assessor ignore that the Commission heard substantial factual evidence, credited the testimony of Bayer's witnesses and concluded that

Bayer's errors were inadvertent and not the result of negligence and thus satisfied the statutory criteria, 11/6/2003 Tr. at 200, and that Bayer sought relief in a timely manner, *id.* at 163. Those findings are fully supported by the record evidence and the testimony of Bayer's witnesses, who were the only witnesses presented before the Commission. *See, e.g., id.* at 190, 193 (testimony of Glenn Kraynie); *id.* at 96, 109 (testimony of Gary Dzura); *id.* at 77, 79-80 (testimony of Steven Broadwater). They instead suggest that the Commission is entitled to no deference in deciding whether errors that lead to tax overpayments warrant exoneration. Their claim that the Commission has no expertise in this area overlooks that the State legislature authorized the Commission, as an institution, to decide these issues and that the Commission has done so for many years. *E.g., id.* at 141 (noting that Commission has "heard thousands of these cases"). Moreover, to the extent that exoneration turns on traditional factual questions, West Virginia law is clear that deference is due to the factfinder that heard the relevant testimony. *Cf.* W. Va. R. Civ. P. 52(a) (factfinding by tribunal can be disturbed only is clearly erroneous). Indeed, under the Prosecuting Attorney's view, when Bayer alerted the Commission to errors that would *increase* its tax burden those errors plainly were "inadvertent," Prosecuting Attorney Br. 3, but that indistinguishable errors by Bayer are not "inadvertent" — and thus not subject to exoneration — when they would *decrease* Bayer's tax burden. *Id.*; *see id.* at 10-19. That is not an appropriate or fair interpretation of West Virginia's statutory exoneration system.

Lastly, the Prosecuting Attorney contends that he is entitled to advance these radical arguments on behalf of the State of West Virginia even though the State has declined to appeal the Commission's exoneration decision. Prosecuting Attorney Br. 22-26; *see also* Bayer Br. 2. Indeed, the clear theme advanced again and again by the Prosecuting Attorney is that West Virginia law should be interpreted to make the recovery of tax overpayments as difficult as

possible even though there is no support for that view in the statute enacted by the West Virginia legislature. W. Va. Code § 11-3-27(a). Despite West Virginia's adoption of a statutory scheme allowing taxpayers to recover tax overpayments, the Prosecuting Attorney makes no effort to balance the competing interests of government that is dependent upon tax receipts and the interests of taxpayers to recover tax overpayments when the relevant statutory criteria are satisfied. In doing so, the Prosecuting Attorney vividly demonstrate that he is an improper party to appeal a Commission ruling that the State of West Virginia declined to appeal.

II. ARGUMENT

A. The Circuit Court Erred by Failing to Defer to the Commission's Fact-Finding.

Bayer previously showed that the Circuit Court's decision should be reversed because the Court applied the wrong standard of review to the County Commission's fact-finding. Bayer Br. 14-20. Appellees' arguments in no way undermine the conclusion that the Circuit Court's *de novo* review is contrary to well-established West Virginia law.

1. West Virginia Law Requires That the Commission's Exoneration Ruling Be Subject to Deferential Review.

Bayer's opening brief showed that more than 80 years ago, this Court ruled that a County Commission's determinations in an exoneration proceeding can be overturned with a showing that it was "clearly and fully rebutted" as "clearly erroneous." *Humphreys v. County Court of Monroe County*, 90 W. Va. 315, 110 S.E.2d 701, 702 (1922) (*quoted in* Bayer Br. 14-15). Further, Bayer demonstrated that a long series of cases reaffirms the vitality of this deferential standard of review. *See* Bayer Br. 15-20 (collecting cases holding that a circuit court defers to

the quasi-judicial findings of County Commissions and other bodies even upon certiorari review).[1]

In response, the Prosecuting Attorney does not distinguish, let alone cite, *Humphreys* or the other cases upon which Bayer relied. *See* Prosecuting Attorney Br. 26-27. Indeed, the Assessor cites *Humphreys* for the undisputed proposition that a circuit court reviews the Commission's decision by writ of certiorari, *see* Assessor Br. 11, but fails to acknowledge that *Humphreys* also sets forth the appropriate standard of review of the Commission's exoneration determination. *Compare id.* at 10-15. Likewise, the Prosecuting Attorney and the Assessor ignore this Court's decisions ruling that a reviewing court may not "substitute its discretion" for that of the initial fact-finder based on its review of the record even when review is based upon certiorari. *E.g.*, *Danielley v. City of Princeton*, 113 W. Va. 252, 167 S.E. 620, 622 (1933); *Jefferson Utils.*, 218 W. Va. at 441, 624 S.E.2d at 874 ("a reviewing court should reverse . . . where the board . . . was plainly erroneous in its factual findings"); *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 542, 591 S.E.2d 93, 100 (2003) (reviewing court may not "substitute[] its judgment" on certiorari for that of initial fact-finders).

Their failure to address *Humphreys*, *Corliss*, *Danielley* and others is dispositive because these cases clearly set forth the appropriate deferential standard of review of the Commission's

[1] Although he fails to distinguish these authorities, the Assessor attempts to diminish their force by arguing that "reading the certiorari statute as coextensive with the APA violates rules of statutory interpretation." Assessor's Br. 13-15. In doing so, the Assessor erects a straw man. Bayer has never contended that *certiorari* review and the APA are absolutely co-extensive. Rather, Bayer submits that in cases like *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977), in which certiorari review follows a proceeding that fails to accord due process, it may very well be the case that additional fact-finding is warranted by the circuit court, making the review quite different from the APA. Yet this was not such a case, but was one where the circuit court sat as an appellate tribunal reviewing the fact-finding below. Accordingly, this case is indistinguishable from cases like *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873 (2005), in which the circuit court's reviewed a board decision under its certiorari jurisdiction under a clearly erroneous standard for factual findings. *Id.* at 440-41, 624 S.E.2d at 877-78.

exoneration ruling. Accordingly, the Circuit Court erred by applying *de novo* review to the factual determinations made by the Commission.

2. *De Novo* Review of Commission Findings In Exoneration Proceedings Would Be Inappropriate.

Rather than address this Court's controlling precedent, the Prosecuting Attorney and Assessor instead (i) cite a series of cases that Bayer has shown are inapposite, and (ii) advance arguments that this Court has rejected. Their core argument is that W. Va. Code § 53-3-3 and *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982) require that Circuit Courts apply *de novo* review. Prosecuting Attorney Br. 26-27; Assessor Br. 10-21. That is mistaken.

First, Section 53-3-3, as the Prosecuting Attorney and the Assessor acknowledge, does not refer to or compel *de novo* review. *See* Prosecuting Attorney Br. 26 (quoting statute); Assessor Br. 11 (same). Indeed, *Humphreys* itself rejects the notion that section 53-3-3 requires *de novo* review because there, this Court, applied the predecessor certiorari statute (which employed the same language as the current statute) and ruled that the Commission's determination was subject to a deferential standard of review. *Humphreys*, 90 W. Va. 162, 110 S.E.2d at 702.

To be sure, section 53-3-3 does not preclude *de novo* review in different contexts "*in proper circumstances.*" *Harrison*, 169 W. Va. at 175, 286 S.E.2d at 283 (emphasis added) (citing *North v. West Virginia Board of Regents*, 160 W. Va. 248, 261, 233 S.E.2d 411, 419 (1977)); *accord North*, 160 W. Va. at 258-60, 233 S.E.2d at 418-19 (finding such expanded review appropriate because the limited procedures employed by the initial fact-finding tribunal left this Court similarly unable to determine whether due process had been satisfied). For instance, in *Harrison*, this Court ruled that *de novo* review was appropriate in that case because the administrative tribunal had not made factual findings upon which an order could be based.

See 169 W. Va. at 176-77, 286 S.E.2d at 284. *Harrison*, however, does not stand for the broad proposition that *de novo* review is mandated in all cases and under all circumstances.

Specifically, the Assessor is mistaken in arguing that Bayer's reading of *Harrison* is "foreclosed" by the following paragraph from that decision:

> "Moreover, we recently held . . . . that 'when the circuit court sits in review of the decisions of administrative tribunals it shall record findings of fact and conclusions of law along with the judicial orders which it issues. [citation] It is obvious that the circuit court could not comply with this requirement without making its own independent review of the law and facts pertinent to this case."

Assessor Br. 16-17 (quoting 169 W. Va. at 175, 286 S.E.2d at 283). To the contrary, this passage confirms that the circuit court in *Harrison* was required to make its own "findings of fact" because, as the *Harrison* Court went on to explain, "*neither the state hearing officer* nor the circuit court made findings of fact." 169 W. Va. at 176, 286 S.E.2d at 284 (emphasis added).

In contrast, there has been no showing that this case involves any special circumstances that would require *de novo* review of the Commission's factual determinations. Rather, the Commission made factual findings based upon the extensive testimonial record developed in hearings conducted in accord with the exoneration statute. *See* Bayer Br. 27-32, 35 & n.11; *see also* Prosecuting Attorney Circuit Court Br. 1 (conceding below that the circuit court reviews "issues of fact under a 'clearly erroneous' standard of review").[2]

Equally baseless is the Assessor's claim that the historic nature of equity and agency review supports *de novo* review. Assessor Br. 17-18. Based on several law review articles noting that courts of equity did not typically hear live testimony, the Assessor argues that circuit

[2] As Bayer has acknowledged, the Circuit Court's reconsideration order attempted to justify its *de novo* review by suggesting that the Commission failed to make findings of fact. *See* Bayer Br. 35 n.11. Bayer showed, however, that the Commission had, in fact, made extensive findings, *see id.*, and neither the Prosecuting Attorney nor the Assessor have rehabilitated the Circuit Court's erroneous suggestion to the contrary.

courts should review all testimony *de novo* where, as here, review to the Circuit Court is based upon certiorari jurisdiction. *See id.*[3] That argument ignores that proceedings under § 11-3-27 differ in the most fundamental respect from the chancery and equity proceedings upon which she relies. Although she admits that "chancellors in equity almost always based their decisions on sworn pleadings . . . without a jury's input," *id.*, the Assessor cannot dispute that the record here involved live testimony before the Commission including questioning by the Commissioners of the witnesses who appeared to testify.

That core distinction forecloses the Assessor's argument. Prior to the Circuit Court's review, the Commission sat as fact-finder, hearing live evidence and making credibility determinations as would a jury. *Compare id.* at 17 ("'the courts of equity received the testimony of witnesses only in the written form of depositions'") (citation omitted). As such, exoneration proceedings in West Virginia bear no substantive resemblance to the equitable proceedings upon which the Assessor's argument is based. Put another way, even if *de novo* review might be appropriate if the Commission were to make findings based upon a cold record, that argument does not assist the Assessor because the Commission heard and considered live testimony in making the findings that warranted exoneration for Bayer. Indeed, the Assessor's argument is contrary to the statutory scheme, which requires that exoneration requests be "heard" by the Commission. *See* W. Va. Code § 11-3-27 (referring to the application being "heard").

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[3] The Assessor's argument is undermined by her claim that because § 53-3-3 "authorizes a circuit court to decide 'all questions arising on the law and evidence,'" the court necessarily is fulfilling a fact-finding, not appellate, function. On the contrary, this Court routinely has recognized that an *appellate court*'s role in assessing a jury verdict is constrained by a similar standard: "'[i]n determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, *fairly arising from the evidence* in favor of the party for whom the verdict was returned, must be considered.'" *E.g.*, *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 644, 609 S.E.2d 895, 905 (2004) (citation omitted) (emphasis added).

The Assessor's suggestion that the Circuit Court properly deferred to the Commission's findings, *i.e.*, treated them as "persuasive and presumptively correct, but not conclusive," is belied by her own argument. Assessor Br. at 18 (citation omitted). The *Presidio Mining Co.* case upon which she relies for that standard recognizes that the reviewing court must defer to the lower tribunal where "evidence is conflicting" and the fact-finder "has had the opportunity of seeing the witnesses . . . and . . . determine their credibility and the weight to be given their testimony." *Id.* (citation omitted). Although the Assessor claims the Circuit Court properly did so, that is not accurate. To the contrary, as set forth below, the witnesses before the Commission gave testimony that, if credited, compelled the conclusion that Bayer's conduct was not negligent. 11/6/2003 Tr. 61-64, 121-22, 126-29, 133, 147-49, 153, 189, 193-94. Indeed, the State Tax Commissioner himself admitted that Bayer met its evidentiary burden, thereby creating a question of fact upon which the Commission properly could have ruled for Bayer. *Id.* at 203-04. This is precisely the scenario where deference to the fact-finder's evaluation of evidence is warranted.

Similarly, the Assessor argues that the Commission's findings are not entitled to deference because exoneration issues are not within an area of agency expertise. *See* Assessor Br. 18-20. At the outset, that argument ignores that the West Virginia legislature has authorized the Commission alone to address exoneration petitions, to take and hear evidence, and to resolve exoneration requests. W. Va. Code § 11-3-27. Acting upon that authority, county commissions across the State have developed institutionalized knowledge in resolving exoneration requests. 11/6/2003 Tr. 141 ("Don't you think that as we've sat here and heard thousands of these cases that we know" what Bayer must prove) (statement of President Carper). Moreover, in this case, it is clear that the Commission's ruling was based upon the significant knowledge that individual

commissioners brought to bear on the testimony presented at trial. As Commissioner Hardy explained, "I also understand and appreciate the section of law that's at issue and I draw upon [my experience] right here at home in our own shop, we spent the whole year . . . with one of the best accountants I know . . . trying to implement a new accounting software system that lead [sic] to one inadvertent act or mistake after another . . . and I didn't find that [the accountant] had acted negligent[ly] in any way." *Id.* at 202. Indeed, the Commission is intimately involved in the taxation process generally and thus has significant expertise in characterizing the nature of errors that affect taxation.

In any event, even if the findings by the Commission lacked any element of expertise and instead were purely factual findings, such a conclusion would further *support* the deferential review of the Commission's factfinding. Specifically, if the findings by the Commission were not based upon expertise, then the deference owed to the Commission under the State's exoneration scheme would be appropriate for the same reason that appellate courts defer to the factual findings of a jury or a judge in a bench trial. In West Virginia, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside *unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. W. Va. R. Civ. P. 52(a); *State v. Thompson*, 220 W. Va. 246, 254, 647 S.E.2d 526, 534 (2007) ("An appellate court does not reweigh the evidence presented in the court below.") (citation omitted); *Dangerfield v. Akers*, 127 W. Va. 409, 413, 33 S.E.2d 140, 142 (W. Va. 1945) (recognizing that in "a case involving conflicting testimony and circumstances," the fact-finder's conclusions "will not be set aside unless plainly contrary to the weight of the evidence, or without any evidence to support it") (internal quotation marks and citation omitted). Here, the Commission heard substantial evidence presented by Bayer and reached the factual conclusion

that Bayer's errors were inadvertent and therefore warranted exoneration. *See* 11/6/2003 Tr. at 163, 200.

In this regard, the Assessor errs by relying on cases holding that the judiciary is authorized to resolve disputes in the first instance that do not fall within an agency's primary jurisdiction. *See* Assessor Br. at 19-20. Such cases are inapposite because West Virginia law mandates that the Commission (not the Circuit Court) resolve all exoneration claims in the first instance. *See* W. Va. Code § 11-3-27; 11/6/2003 Tr. at 42 ("the statute gives this Commission the authority, if not the responsibility, to make the decisions as to whether relief is or isn't granted") (statement of the Tax Commissioner's attorney Mr. Hoffman). Thus, the Assessor's reliance on a quotation from *South Eastern Indiana Natural Gas Co. v. Ingram*, 617 N.E. 2d 943, 950 (Ind. Ct. App. 1993), is improper. In *Ingram*, as the Assessor quotes, the court stated "[i]t takes no special expertise to resolve the negligence question." *Id.* (*quoted in* Assessor Br. 20). However, the *Ingram* court's remark was not made in the context of the deference owed to an agency or other tribunal's finding of negligence as is at issue here. Rather, the court was considering administrative exhaustion and primary jurisdiction challenges to a trial court's jurisdiction because the plaintiffs had not previously brought their negligence claims before a state regulatory commission. *See id.* at 946, 950 n.4. The Indiana intermediate appellate court rejected that challenge, ruling that finding the Indiana courts have "original subject matter jurisdiction to hear a claim sounding in negligence." *Id.* at 947. Its comment on the commission's lack of special expertise was limited to the commission's role within Indiana's specific statutory and regulatory context, which put the negligence issue directly to "the judiciary *and its fact-finding jury*." *Id.* at 950 (emphasis added).

Here, under West Virginia's statutory scheme, the Commission is charged with fact-finding on the question whether an error is inadvertent and, as a result, the circuit court owed traditional deference to the Commission's findings.

3. The Separation of Powers Doctrine Forecloses *De Novo* Review Here.

Bayer's opening brief also showed that the separation of powers doctrine of the West Virginia constitution prevents circuit courts from reviewing the Commission's fact-finding *de novo*. *See* Bayer's Br. 20-27. Specifically, in *Frymier-Halloran v. Paige*, 193 W. Va. 687, 458 S.E.2d 780 (1995), this Court held the West Virginia Constitution will not permit courts to "review [an agency's] factual determinations *de novo*." *Id.* at 694, 458 S.E.2d at 787 (holding that any reversal must rest on the lower tribunal's decision having "contradict[ed] some explicit constitutional provision or right," "result[ed] from a flawed process," or being "either fundamentally unfair or arbitrary"). Further, this Court has applied those rulings in the context of decisions by a county commission, concluding judicial review of decisions of the commission is limited to the same scope permitted in *Frymier-Halloran*, *i.e.*, "roughly the same scope permitted under the West Virginia Administrative Procedures Act." *See In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000). Thus, such limitations apply here.

The Prosecuting Attorney does not address Bayer's argument directly. *See*, *e.g.*, Prosecuting Attorney Br. iii-iv (failing to cite *Frymier*, *American Bituminous*, or any other separation of powers cases which Bayer relied upon). Instead, he asserts that "there is no doctrine of separation of powers at levels of government below the state level." *Id.* at 24; *see* Assessor Br. 21-25 (arguing that the separation of powers doctrine does not apply to local

government).[4] That position, however, is inconsistent with this Court's ruling in *American Bituminous* that a circuit court's review of a decision of the board and equalization and review is constrained by application of the *Frymier-Halloran* rule. *See also In re Brandon Lee H.S.*, 218 W. Va. 724, 732, 629 S.E.2d 783, 791 (2006) (reiterating vitality of separation of powers provisions at county level, and stating that the "separation of powers provision precludes courts from exercising administrative duties relating to executive branch in refusing to use judicial power of mandamus to control fiscal affairs of *county court*") (emphasis added) (citing *State ex rel. Canterbury v. County Court*, 151 W. Va. 1013, 1019, 158 S.E.2d 151, 156 (1967)).

B. The Testimony and Evidence Presented to the Commission Supported Its Finding That Exoneration Was Warranted.

In its brief, Bayer further showed that the evidence presented at the hearing and the facts found by the Commission fully supported its ruling that Bayer was entitled to exoneration of its overpaid taxes. Bayer Br. 2-5, 32-40; Bayer Pet. 4-7, 11, 40-46. Central to this conclusion is that the State Tax Commissioner's candid acknowledgment that Bayer had presented "enough evidence" during the hearing to allow the Commission to rule in its favor. 11/6/2003 Tr. 203-04. Commissioner Hardy of the Commission majority characterized that evidence as "very, very strong" in concluding that Bayer was entitled to exoneration on account of its "inadvertent act or mistake." *Id.* at 201.[5] In their briefs, Appellees do not address any of these matters, but instead

[4] The Prosecuting Attorney also suggests that Bayer relies on *McGraw* as support for its separation of powers argument. Prosecuting Attorney Br. 24. That is wrong. Bayer, as discussed above, has relied on *McGraw* for the proposition that because the State's executive interest is implicated in this case, the Attorney General was required to appear as counsel of record and sanction the Prosecuting Attorney's appellate challenge to the County Commission's decision. *See, e.g.*, Bayer Br. 10-11; Bayer Pet. 12, 21-22.

[5] Bayer's evidence was sufficiently strong to overwhelm the inherent conflict of interest, described in Bayer's pending appeal before this Court, under which the Commission labors when it hears legal challenges that may reduce the County's tax base. *See Bayer MaterialScience LLC et al. v. State Tax Commissioner*, Case Nos. 33378, 33880, 33881, Brief of Bayer MaterialScience et al., at 19-28 (filed May 16, 2008 W. Va.).

ask the Court to reweigh the evidence presented to the Commission and independently determine both that (i) Bayer's requests for exoneration (for tax years 2001 and 2002) should have been rejected as untimely, and (ii) exoneration should have been denied because the Bayer's errors were the result of negligence. As demonstrated below, these arguments should be rejected.

1. Bayer's Application for Exoneration Was Timely Filed.

Section 11-3-27 permits exoneration if an application is filed "within one year from the time the property books are delivered to the sheriff or within one year from the time such clerical error or mistake is discovered or reasonably could have been discovered." W. Va. Code § 11-3-27. Based on the evidence Bayer presented at the hearing, the Commission found that Bayer timely filed for exoneration relief for tax years 2001 and 2002 within one year from the time in which the mistake was discovered or reasonably could have been discovered (there was no dispute as to the timeliness of the 2003 application). *See* Commission Order 2004-128, Bayer Br. 3-4; 11/6/2003 Tr. 24, 44, 163. Like the Commission's other rulings discussed above, its conclusion that Bayer timely filed for relief rests on findings of fact which are fully supported and entitled to deference. *See, e.g., Merrill v. W. Va. Dep't of Health & Human Res.*, 219 W. Va. 151, 171, 632 S.E.2d 307, 327 (2006) (determining the onset of a limitations period constitutes a question of fact); Syl. Pt. 1, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988) ("determining that point in time [when a party by the exercise of reasonable diligence should have known it had a claim] is a question of fact"); *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W. Va. 12, 20 n. 14, 365 S.E.2d 57, 65 n.14 (1987) ("Whether more than three years had passed after [party] discovered or should have discovered . . . violations is a question of fact for jury determination, precluding summary judgment.").[6]

[6] Although the Circuit Court stated that it "determined that the [Commission's] Order . . . should be reversed, except for the determination by the County Commission that the applicable standard of proof

The Tax Commissioner presented no witnesses. Instead, Bayer presented uncontested evidence, credited by the Commission, that it was able to discover the mistakes only after making "extraordinary" efforts and filed its application within one-year of that reasonable discovery date. *See, e.g.*, Bayer Br. 4 (citing record). As detailed by Bayer's counsel Steven Broadwater, he found these errors in Bayer's 2001, 2002, and 2003 tax returns while responding to discovery in unrelated tax litigation. 11/6/2003 Tr. 67. As Mr. Broadwater explained to the Commission, finding these errors was "very difficult and time consuming" *id.* at 77, and required more than "50 billable hours" to discover, *id.* at 79-80. Likewise, Mr. Dzura testified, without contradiction, that Bayer files ten thousand tax returns each year at the federal, state and municipal level, *id.* at 96, and that Bayer, like other similarly situated companies, does not, in the ordinary course of business, conduct internal audits of previously filed tax returns, *id.* at 109. Indeed, the cases cited by the Prosecuting Attorney make plain that when the law imposes an obligation of "reasonable care," a person need not "exercis[e] extraordinary care" or effort. Syllabus Point 6, *Patton* v. *City of Grafton*, 116 W. Va. 311, 180 S.E. 267 (1935) (cited by Prosecuting Attorney Br. 12); *Honaker* v. *Mahon*, 210 W.Va. 53, 58, 552 S.E.2d 788, 793 (2001) ("reasonable" care does not require a person to exercise "extraordinary" efforts) (cited in Prosecuting Attorney Br. 12).

In response, the Prosecuting Attorney provides no credible basis for overriding the Commission's timeliness findings. Far from doing so, the Prosecuting Attorney's brief repeatedly mischaracterizes the record before the Commission. For instance, the Prosecuting Attorney asserts that it is "obvious" that Bayer "could have easily uncovered the error [in tax

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is by a preponderance of the evidence," Order at 8, the Circuit Court did not rule that Bayer's application was untimely. The Prosecuting Attorney appears to concede that he bears the burden to show the Commission's findings were incorrect, and that his burden is a heavy one. *See* Prosecuting Attorney Br. 15 (asserting that "[a] review of the record shows clearly and convincingly that [Bayer] knew or reasonably should have known" of the errors earlier).

year 2001] by engaging in standard accounting practices by reviewing the industrial personal property tax listing." Prosecuting Attorney Br. 15. That assertion is flatly and repeatedly contradicted by the record. As Bayer's witness Mr. Dzura testified, Bayer files thousands of tax returns each year and there was an erroneous "difference between the accounting records from which the tax returns were prepared versus the accounting records at the plant sites." 11/6/2003 Tr. 106, 121. Bayer prepared the returns believing the underlying records to be correct and consistent, *see id.*, and moreover reviewed the Notices of Appraised Value received from the State to confirm that the appraised values were consistent with the values reported on the return, *id.* at 111. Furthermore, Bayer presented evidence that outside of these reviews, Bayer did not, in the ordinary course of business, conduct internal audits of the many thousands of tax returns that it files on the federal, state and local levels. *id.* at 109 ("[W]ithin my years in the Bayer Tax Department, there has never been an internal audit of any of our federal or state returns") (testimony of Mr. Dzura); *see also id.* at 104 (no property tax audits by the State of West Virginia); *id.* at 96 ("there would be annually ten thousand tax returns that we file across income, sales and use and property taxes").

Similarly, the Prosecuting Attorney makes the misleading suggestion that Bayer's "tax chief [was] aware of problems with the quality of [its outside accountants'] work," which purportedly should have led to earlier discovery. Prosecuting Attorney Br. 15. This argument is refuted by the record. *See* 11/6/2003 Tr. 127. In point of fact, the concern Bayer expressed with respect to the outside accountants for the 2001 tax year was not that the returns might have contained an error, and indeed had nothing to do with the erroneous underlying data that triggered the inaccurate return. Rather, Bayer's witness testified that he had no opportunity to review the outside accountants' work before it was submitted although Bayer requested the

opportunity to do so. *See id.* at 125-26, 128, 138. But the undisputed testimony was that Bayer had the opportunity to review the returns shortly after they were filed, and that the review uncovered no error because the outside accountant properly reported the data provided to it by Bayer. *Id.* at 134, 145.[7]

Equally unsupported are the Prosecuting Attorney's claims that the errors in the 2002 and 2003 reports "must have been plainly obvious" since they were uncovered by counsel. Prosecuting Attorney Br. 16-17. Again, the evidence does not support that assertion. The evidence showed that counsel's discovery was outside the ordinary course of preparing and filing tax returns and required over 50 hours of his labor, including review of data different from that used from which returns were prepared. *See, e.g.*, 11/6/2006 Tr. 57-60, 65, 76, 79-80. When counsel requested the inventory reports from local plant personnel, he discovered that the numbers provided did not match those in the State's assessment documents. *See id.* at 61-62. Only then was it determined that inadvertence caused the wrong inventory reports to be provided in the first instance, an error which Bayer had not discovered when it reviewed the returns in the ordinary course of business.

Because the Prosecuting Attorney fails to provide competent evidence in support of his claims that Bayer earlier could have discovered the errors—never mind clear and convincing evidence that would have allowed the Circuit Court to overturn the Commission's findings of

[7] As noted, the Tax Commissioner presented no witnesses before the Commission. The lack of support for the Prosecuting Attorney's position is illustrated by his reliance on *Jackson v. Wheeling Terminal Railway Co.*, 65 W. Va. 415, 64 S.E.2d 450, 451 (1909), for the proposition that Bayer was on "inquiry notice that something was amiss" with the returns, such that the mistakes could be attributed to company negligence. *Jackson* raised the question whether a train worker's injury could be attributed to the negligence of the crew of a following train which found a "tunnel filled with smoke, so dense as to prevent them from ascertaining, by sight, whether there [wa]s a train ahead of them, and so close as to render it dangerous for them to proceed," but nonetheless proceeded and thus caused plaintiff's injury. Those facts are not remotely applicable here.

fact as being clearly erroneous that the applications were timely submitted—his argument should be rejected.

2. The Commission Properly Determined That Bayer's Errors Were Inadvertent and Not the Result of Negligence.

The Prosecuting Attorney and the Assessor contend that the Commission erred in granting exoneration to Bayer because the errors that resulted in the overpayment of taxes by Bayer were not inadvertent but instead were the result of negligence. *See, e.g.*, Assessor Br. 25-34. At the outset, there is no dispute that errors by Bayer resulted in overpayment of more than $450,000 in taxes. 11/6/2003 Tr. 18, 44, 152. They argue that under *de novo* review, the Circuit Court properly reweighed the relevant evidence and ruled against Bayer. Prosecuting Attorney Br. 2-8, 12-13, 16-18; *see also* Assessor Br. 27-36. As noted above, *de novo* review is inappropriate under the circumstances presented in this case. Moreover, the evidence fully supported the Commission's determination that exoneration was warranted.

Under Section 11-3-27(a), exoneration is appropriate if the overpayment of tax is the result of a "clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment." *Id.* Here, the evidence showed that Bayer's overpayment of taxes resulted from errors in reporting the inventory on June 30th, and errors identifying inventory as being located in Kanawha County rather than in transit in interstate commerce. 11/6/2003 Tr. 39, 40.

On the issue whether these errors were the result of negligence, only Bayer presented witnesses and those witnesses testified that these errors came about because in April 2001, Bayer purchased from Lyondell Chemical "the South Charleston and part of the Institute chemical facilities." *Id.* at 99. As Mr. Dzura explained, "there was a difference between the accounting records from which the tax returns were prepared" at Lyondell and Bayer. *Id.* at 106. Bayer

sought to reconcile these competing systems "immediately after day one of the acquisition." *Id.* at 175 (testimony of Mr. Kraynie). Moreover, the testimony credited by the Commission was that, in connection with acquisitions of this size, "there is typically a very long transition period before the operation is fully integrated." *Id.* at 121 (testimony of Mr. Dzura).

More specifically, the Commission was entitled to credit testimony that Bayer's employees working to integrate the competing accounting systems were a "world class experienced professional staff" who used "extraordinary care" during the transition period at issue here. *Id.* at 190, 193. Notwithstanding the extraordinary efforts of its staff, Bayer ultimately supplied data that were erroneous on its tax returns. *E.g.*, *id.* at 188.[8] Relying on this evidence, Commissioner Hardy explained that he drew upon his own experiences dealing with an accountant trying to implement "a new accounting software system" for "the whole or a good part" of the year, and that resulted in "one inadvertent act or mistake after another in our own shop" even though the accountant had not "acted negligent in any way." *Id.* at 202.

In an effort to distract attention from the evidence credited by the Commission, the Prosecuting Attorney and Assessor rely on snippets taken out of context to argue that Bayer

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[8] The Assessor reiterates a claim made by the Circuit Court in its order denying Bayer's motion for reconsideration, namely that the circuit court treated all of Bayer's witnesses' testimony as true. *See* Assessor's Br. 18; Reconsideration Order at 8. As Bayer previously showed, however, the Circuit Court's comments cannot be reconciled with the evidence presented to and credited by the Commission and the Tax Commissioner's candid concession that there was enough evidence to support the Commission's finding. *See* Bayer Br. 33-34, 36-37. The Assessor now tries to justify the Circuit Court's reweighing of evidence by claiming "the circuit court did not treat as true certain statements of Bayer's witnesses reaching conclusory and unsupported opinions" and that because those statements were "not probative . . . the circuit court justifiably did not rely on them." Assessor Br. 18 n.3. That argument, however, requires the Assessor to rewrite the circuit court's reconsideration order, which contained no such caveat. *See* Reconsideration Order at 8 (discussing the "testimony of Bayer's witnesses and statements of Bayer's counsel—*all of which* the Court to be absolutely true") (emphasis added). Given that counsel for the Assessor drafted the reconsideration order adopted by the Circuit Court, the Assessor's attempt to rewrite that order now should be rejected. *See Payne v. Weston*, 195 W. Va. 502, 509, 466 S.E.2d 161, 168 (W. Va. 1995) ("Our interpretive rules of construction regarding ambiguity require that, under such circumstances, we construe the language against the drafter, the party who had the authority and opportunity to bring about clarity.").

somehow conceded that its conduct was negligent within the meaning of 11-3-27(a). Both of the response briefs focus on a statement from Bayer's attorney Mr. Rose seeking to correct Commissioner Carper's characterization of the testimony of Bayer's witness Mr. Dzura:

> COMMISSIONER CARPER: You mean, they went out and they bought companies all over the place and they were real busy and they didn't have time to know what they were doing?
>
> MR. ROSE: That's not the -- that's true.

11/6/2003 Tr. 114. The Prosecuting Attorney's Response Brief erroneously characterizes this exchange as testimony of one of Bayer's witnesses, Prosecuting Attorney Br. 7. Similarly, the Assessor contends that this statement is a judicial admission that Bayer cannot now explain or contradict. Assessor Br. 31.

Yet viewing this exchange in context reveals that two of the Commissioners and Mr. Rose were arguing over the correct interpretation to be drawn from Mr. Dzura's testimony:

> COMMISSIONER HARDY: The way I view this witness' testimony and, Ned, if I'm getting what your intent is, it illustrates why internally; number one, how the mistake was made and; number two, why it wasn't discovered prior to Mr. Broadwater's review. Is that the intent of his testimony?
>
> MR. ROSE: That's exactly his intent.
>
> COMMISSIONER CARPER: You mean, they went out and they bought companies all over the place and they were real busy and they didn't have time to know what they were doing?
>
> MR. ROSE: That's not the -- that's true.
>
> COMMISSIONER CARPER: Sure, because that's what he testified to.
>
> MR. ROSE: Sure, and that's specifically relevant here.
>
> COMMISSIONER CARPER: What's that got to do with why they didn't discover their mistake?
>
> MR. ROSE: Well, I think Mr. --

COMMISSIONER CARPER: They were so just busy buying companies over the world?

MR. ROSE: No, that's not the point of that testimony at all.

COMMISSIONER CARPER: Well, why did you put it on for?

MR. ROSE: Well, because the reason that there were errors made was contributed to substantially by virtue of the fact that the property that's being reported was property that was just recently acquired by another company that had a completely different set of accounting records systems.

Tr. 114-115. Even a cursory review of this exchange refutes the notion that counsel for Bayer made any admission with respect to the substantive testimony of Bayer's witnesses. Indeed, Commissioner Hardy understood the impact of this evidence:

COMMISSIONER HARDY: And let me see if I understand. Your group in Pittsburgh, which is trying to get this material together, didn't grasp exactly how they kept their records or what they were doing down in South Charleston or down in West Virginia. I guess the plant's in South Charleston officially?

THE WITNESS: Yes, sir.

COMMISSIONER HARDY: So they fill out the return and then Steve goes to South Charleston two years later, gets the South Charleston material, and finds that it doesn't match the information put on in Pittsburgh. That's the way I understood your testimony.

THE WITNESS: And it's substantially accurate, right.

COMMISSIONER HARDY: Right, and I'm paraphrasing, but that's the way I understood it.

THE WITNESS: Sure.

COMMISSIONER HARDY: Now, in my view the fact that you just acquired the South Charleston plant and was generally unfamiliar with it because you got it from another company has some relevance, in my mind, as compared to the fact that if you had owned that plant 20 or 30 years and your accountants in Pittsburgh had been working with it for or years.

THE WITNESS: Yes, sir.

COMMISSIONER HARDY: I thought that was relevant. . . .

11/6/2003 Tr. 118-19. Based on this evidence, the Commission concluded that the errors that led to the overpayment of tax by Bayer for tax years 2001, 2002, and 2003 were not the result of negligence, but were inadvertent mistakes for which Section 11-3-27 affords Bayer relief.

Simply put, this evidence presented by Bayer fully supports the Commission's ruling. Indeed, Bayer's evidence stood unrefuted because the Tax Commissioner presented no contrary witnesses of his own. As such, and as the Assessor admits, fact-finding by a tribunal is "not to be ignored" and the trial court's findings are "presumptively correct." Assessor Br. 18 (internal quotation marks and citations omitted).

C. Neither the Prosecuting Attorney Nor the Interveners Had Standing to Petition for Review Before the Circuit Court.

1. The Real Party in Interest, the State of West Virginia, Did Not Invoke the Circuit Court's Jurisdiction.

The Prosecuting Attorney does not make any credible showing that he is a real party in interest such that he had standing to prosecute this action in the Circuit Court after the State of West Virginia, acting through the Tax Commissioner, declined to seek review of the Commission's decision. In its petition and opening brief, Bayer showed—and the Prosecuting Attorney does not dispute—that all proceedings must be prosecuted by the real party in interest. *See* W. Va. R. Civ. P. 17(a); Prosecuting Attorney Br. 23. Moreover, in cases involving property valuation and *ad valorem* taxation, the State of West Virginia is the real-party-in-interest. As this Court has held, the counties of West Virginia are "answerable . . . to the state in the person of the tax commissioner" and only "exist to carry out the purpose of state government." *Killen*, 170 W. Va. at 621, 295 S.E. 2d at 708.

The Fair and Equitable Property Valuation Act, W. Va. Code § 11-1C-1 *et seq.*, confirms the supervisory position of the Tax Commissioner with respect to the property here at issue. For

example, the Tax Commissioner, rather than the Assessor, now is responsible for valuing industrial personal property for *ad valorem* tax purposes, W. Va. Code § 11-1C-10(c) and the Assessor must accept the Tax Commissioner's value, *id.*, or gain the approval of the Property Valuation Training and Procedures Commission, *id.* § 11-1C-10(g), which is chaired by the Tax Commissioner or his designee, *id.* § 11-1C-3(a).

The State's status as the real party in interest is confirmed by this Court's functional definition of that phrase. To be a real party-in-interest, one must have the "power to make final and binding decisions concerning the prosecution, compromise, and settlement" of the claims at issue. Syllabus Point 5, *Keesecker v. Bird*, 200 W. Va. 667, 490 S.E.2d 754, 764 (1997). The counties lack such power. For instance, there is no authority that a county could "settle" claims brought by the taxpayer for alleged overpayment or overvaluation that the State wished to litigate. Likewise, a county cannot continue prosecuting an action that the State believes is unmeritorious. Because the counties "exist to carry out the purpose of state government," *Killen*, 170 W. Va. at 621, 295 S.E.2d at 708, they cannot take positions diverging from or undermining those of the State as the counties' interests are strictly derivative.

Bayer demonstrated that these settled principles are supported by important policy considerations. Specifically, if the Prosecuting Attorney were permitted to override the Tax Commissioner's decisions, the very purpose of Rule 17(a), which serves to shield parties "against the harassment of lawsuits by persons who do not have the power to make final and binding decisions" regarding the aforementioned ability to settle claims, would be eviscerated. Syllabus Point, *Keesecker*, *supra*. Similarly, the foundation for this Court's bright-line rule that "the Attorney General shall appear upon the pleadings as an attorney of record" in "all instances" where the executive branch's interests are at issue would go by the wayside. *State ex rel.*

McGraw v. Burton, 212 W. Va. 23, 41, 569 S.E.2d 99, 117 (2002); *see also* Syllabus, *Blue v. Tetrick*, 69 W. Va. 742, 71 S.E.2d 1033 (1911) (holding the Tax Commissioner is a "state executive officer"). Allowing Prosecuting Attorneys to continue litigation on behalf of the State, to which they are answerable, where the State itself already has weighed its "broader interests" and "the impact" of further litigation on its entities and declined to proceed would result in chaos. *See McGraw*, 212 W. Va. at 41, 569 S.E.2d at 117. It would render the State's goals subordinate to those of a county attorney, a result West Virginia law does not allow.

The Prosecuting Attorney responds by making the extraordinary assertion that he, in fact, has "'the power to make final and binding decisions concerning the prosecution, compromise, and settlement of [tax] claim[s].'" Prosecuting Attorney Br. 23 (citation omitted). He, however, cites no authority for the proposition that the Prosecuting Attorney has power to override decisions of the State of West Virginia acting through the Tax Commissioner. To the contrary, W. Va. Code § 11-1C-7(f) provides that either an assessor or a county commission can be removed from office for willing and knowing refusal to correct any deficiencies as may be ordered by the Tax Commissioner with the concurrence of the Property Valuation Training and Procedures Commission. In fact, he does not distinguish or even cite *Killen*, which holds that West Virginia's counties are all answerable to the State Tax Commissioner.

Finally, in the opening brief, Bayer suggested that the Prosecuting Attorney had effectively acknowledged that the State was the only real party in interest by captioning this case "*State* ex rel. *Michael T. Clifford*" before the circuit court. Bayer Br. 11 (discussing the resulting applicability of *McGraw*, *supra*). Despite the Prosecuting Attorney's most recent representations, *see* Prosecuting Attorney Br. 22-23 (claiming he captioned the action "State *ex rel.*" before the circuit court only because it was a *certiorari* proceeding), he repeatedly

acknowledged below that the interest he sought to vindicate was that of the State. For instance, the Prosecuting Attorney:

- prayed for relief and signed his lower court briefs on behalf of the State of West Virginia, Pet. at 8-9 ("Respectfully submitted, THE STATE OF WEST VIRGINIA, By Counsel"); *compare* Prosecuting Attorney's Br. 29 (signed "PROSECUTING ATTORNEY, APPELLEE");

- listed "State of West Virginia" as the only plaintiff in the circuit court, *see* Civil Case Information Statement at 1-2;

- styled his petition for *certiorari* as follows: "State of West Virginia's Petition for Writ of Certiorari," Pet. 1; *see id.* ("Comes now the State of West Virginia . . ."); *accord* Circuit Court Br. 1 ("Brief of the State of West Virginia);

- represented "Your petitioner the State of West Virginia is authorized to bring this action pursuant to W. Va. Code § 11-3-25. Your relator, [the Prosecuting Attorney], is authorized to bring this action on behalf of the State of West Virginia by the same statute," Pet. 3;

- invoked the State as the interested party, *id.* at 6-7 ("The State of West Virginia asserts . . .").

Therefore, the notion that the Prosecuting Attorney is a real party in interest apart from the State of West Virginia, which chose not to challenge the Commission's ruling in the courts, should be rejected. Because the Prosecuting Attorney lacked standing and the State of West Virginia, the real-party-in-interest, failed to invoke the Circuit Court's jurisdiction, the Circuit Court's decision should be reversed for lack of jurisdiction and the County Commission's order reinstated.

The same principles set forth above illustrate that the Assessor and the Library Board lacked standing to take an appeal. Because the Tax Commissioner protects the interests of the "state, counties and districts," the Assessor and the Library Board had, at most, a derivative interest in this litigation flowing from the interest of the State of West Virginia. *See* Assessor's Br. 7 (admitting that the Assessor's interest is as "an officer of the County"); *id.* at 8 (claiming

that the Library Board's interest stems from its funding by "the Board of Education of the County of Kanawha," "the County Commission" and the "City of Charleston"); *id.* (Library Board is the "recipient of the taxes . . . levied on its behalf"); *see also* Prosecuting Attorney's Pet. 2 (purporting to represent the County Board of Education); *Bd. of Educ. of County of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 639 S.E.2d 893 (2006) (allowing County Board to bring suit against State Board for inadequate provision of financial resources).

As this Court repeatedly has explained, an assessor's duties stem from W. Va. Code § 11-3-1, which makes the assessor answerable to the Tax Commissioner—here, the real party in interest. *See, e.g.*, W. Va. Code § 11-3-1; *In re 1994 Assessments of Property of Righini*, 197 W. Va. 166, 169, 475 S.E.2d 166, 169 (1996) ("The premise upon which the entire assessment process is built is that the State Tax Commissioner has the power of supervising the entire valuation process"); *State ex rel. Rose v. Fewell*, 170 W. Va. 447, 449-50, 294 S.E.2d 434, 436-37 (1982) (confirming "the tax commissioner's authority over assessors and county commissioners in regard to property assessments"). Nonetheless, the Assessor suggests that because "she was present at the exoneration hearing," she has standing to appeal. Assessor's Br. 7-8. That argument is baseless. As the Assessor admits, she did not attend the Commission hearing in the capacity of a party or even an intervener, but rather "[h]er role was to help the Commission understand the issues in the case." *Id.* at 8; *see also* W. Va. Code § 11-3-24, in part ("[t]he assessor and his assistants shall attend and render every assistance possible [to the Board of Equalization and Review] in connection with the value of property assessed by them"). Thus, although she points to "an interest in seeing that her role in providing understanding to the Commission is vindicated," that purported interest in "showing she was correct before the Commission" makes her no different than any witness who testified. *Id.*

2. The Prosecuting Attorney Waived Any Right to Appellate Review.

The Prosecuting Attorney has not contested Bayer's showing that even if the Prosecuting Attorney, not the State alone, was a real party in interest, he waived any right to challenge the Commission's ruling before the Circuit Court. Bayer Br. 11-13. Bayer demonstrated that (1) the Commission held that the hearing had been properly noticed, *id.* at 13, (2) the Prosecuting Attorney received notice of the Commission's subsequent November 20, 2003 hearing at which he could have raised his lack of notice claim, *id.*, and (3) the Prosecuting Attorney did not attend the November 20 hearing at which he could have challenged the Commission's holding that the November 6 hearing had been properly noticed, *see id.*

If, as the Prosecuting Attorney asserts, he was required to receive notice of the Commission's November 6, 2003 hearing separate and apart from that provided the Tax Commissioner, he nonetheless waived any ability to challenge the initial lack of notice on appeal. The Prosecuting Attorney fails to respond to these showings. Instead, he merely reiterates his claim that he did not receive notice of the initial hearing, which is insufficient to address his subsequent waiver. *See* Prosecuting Attorney's Br. 22; *see also id.* at 25 (instead editorializing that "[the Prosecuting Attorney] has confidence that this Court will not find that the [Prosecuting Attorney] had no remedy").[9]

Accordingly, the Circuit Court should have dismissed the appeal.

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[9] In addition, the Court below did not address the Prosecuting Attorney's arguments concerning lack of notice. *In re 1994 Assessments of Property of Righini*, 197 W.Va. 166 at 172, 475 S.E.2d 166 at 172 (1996) ("Our general rule is that when non-jurisdictional questions have not been refined, developed *and adjudicated* by the trial court, they will not be decided on appeal in the first instance") (citations omitted). Because the Court below did not find it necessary to address the Prosecuting Attorney's claims as to notice, neither should this Court.

D. This Court Should Reject the Argument That Bayer Was Obligated to Establish Exoneration by Clear and Convincing Evidence.

The Prosecuting Attorney and Assessor claim that the both the Circuit Court and the Commission erred by holding that Bayer's burden of proof before the Commission was by a preponderance of the evidence. *See* Circuit Court Order at 8, 12. At the outset, it is important to note that there is no dispute that the errors at issue resulted in the overpayment of taxes by Bayer. Nor is there any dispute about the amount of the overpayment. The only issues before the Commission were (i) the timeliness of Bayer's request for exoneration and (ii) whether the errors were the result of negligence. As to these issues, the Prosecuting Attorney and the Assessor fail to cite a single exoneration case holding that a "clear and convincing" burden of proof applies at the first level of adjudication. *See* Prosecuting Attorney Br. 19-20; Assessor Br. 34-36.

Instead, the Prosecuting Attorney and the Assessor make a series of policy arguments in support of their novel argument that a clear and convincing burden of proof applies. These too miss the mark. They first contend that the "clear and convincing" burden should apply because "[t]he risks of reduced funding in later years because of mistakes . . . may cause government to reduce or even eliminate essential services." Prosecuting Attorney Br. 20; *see* Assessor Br. 34 (same). That argument ignores that the West Virginia Legislature has reached a contrary conclusion and has not seen fit to impose this heightened burden of proof in Section 11-3-27.

First, where an error has been proven the State is not deprived of funds to which it is entitled; rather, the taxpayer is allowed to recover, principally through credits applied to later years, taxes to which the State was never entitled. And indeed here, the Tax Commissioner admitted that the State had no claim to the funds at issue absent Bayer's mistake. 11/6/2003 Tr. 153. Additionally, section 11-3-27 recognizes that exoneration may have an impact on tax receipts and structures the award of relief in a manner to prevent substantial disturbance of the

budgeting process and the allocation of services. *See* W. Va. Code § 11-3-27(b) (providing that the taxpayer receive relief "in the form of a credit against taxes . . . for up to the following two years" rather than granting it an immediate refund where "a mistake or error is discovered more than one year after the property books for the year or years in question are delivered"); *contra* Assessor Br. 35 (claiming "the money Bayer seeks to recover has already been budgeted and spent"). Section 11-3-27 does not, however, impose a heightened burden of proof on the taxpayer seeking exoneration. Indeed, by its terms, the exoneration statute applies not only to the taxpayer, but also to the taxing authorities which may seek to remedy their own errors under Section 11-3-27.

The Prosecuting Attorney then argues that "a higher burden of proof" should apply in the exoneration context because the application occurs only "after the taxpayer has had the opportunity to appear before the Board of Review and Equalization [sic], pursuant to W. Va. Code § 11-3-24." Prosecuting Attorney Br. 21. That argument is baseless. The exoneration proceeding presents a taxpayer's first chance to contest an erroneous tax assessment. As such, the Prosecuting Attorney's argument that it is only "sensible that a taxpayer" would face a higher burden of proof rests on the false premise that the exoneration proceeding is akin to a second bite at the apple. Next, even if it were somehow significant that exoneration hearings take place after valuation proceedings have been held, according to the Prosecuting Attorney and the Tax Commissioner, taxpayers also must prove their valuation claims by clear and convincing evidence. Thus, by the Prosecuting Attorney's reasoning, the taxpayer would be forced to meet the heightened standard at every step, making it unclear how having an opportunity to go before the Board is a benefit which supports the "clear and convincing" standard for exonerations.

Because the Prosecuting Attorney and Assessor's arguments for a clear and convincing standard of proof are contrary to *Killen* and lack reason, they should be rejected.[10]

III. CONCLUSION

For these reasons and those stated in Bayer's opening brief and petition, this Court should reverse the Circuit Court and reinstate the ruling of the County Commission.

Respectfully submitted,

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[10] Applying a clear and convincing standard of proof also would have violated Bayer's right to due process. In *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), the United States Supreme Court considered a federal statute providing that "any determination made by a plan sponsor . . . is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." *Id.* at 611. The Court ruled that the statute's constitutionality was saved only by the inclusion of the preponderance of the evidence standard. *See id.* at 629. The Supreme Court remarked that there is "*a substantial question of procedural fairness under the Due Process Clause*" where, as here, a challenging party is required to show the "findings to be either 'unreasonable or clearly erroneous'" at the first level of adjudication. *Id.* at 626 (emphasis added, citation omitted).

NO. 33871

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PROSECUTING ATTORNEY OF KANAWHA COUNTY, WEST VIRGINIA,

Appellee

v.

BAYER CORPORATION

Appellant

CERTIFICATE OF SERVICE

I, Steven R. Broadwater, counsel for the Bayer Corporation, the Appellant herein, certify that service of the "*Reply Brief of Appellant Bayer Corporation*" was made upon the parties listed below by mailing a true and exact copy thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this the 23rd day of May, 2008.

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